Supreme Court, U.S.
FILED

NO. 10-583 OCT 30 2010

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IN THE
SUPREME COURT OF THE UNITED STATES

FELICIA MALVEAUX,
JOHN AYANBADEJO, - *PETITIONERS,*

vs.

JANET NAPOLITANO,
SECRETARY DEPT. OF HOMELAND SECURITY ET AL.; - *RESPONDENTS.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

Respectfully Submitted,
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PETITION FOR CERTIORARI

QUESTION(S) PRESENTED FOR REVIEW

1. Whether the District Court and/or the Court of Appeals has jurisdiction to reopen the time for appeal to afford relief from Petitioners' Counsel's failure to file a timely petition for review with the Court of Appeals of the District Court's summary order denying Petitioners' Complaint for Declaratory Action.
2. Whether the District Court erred by imposing her own views about a "real marriage", establishing conditions and requirements beyond INS regulations and judicial precedent, and insisting that only petitioner's spouse's testimony in an adjustment hearing is relevant.

ISSUES

I. If a Plaintiffs' Attorney in the Court below affirmatively misadvises the plaintiff and then allegedly withdraws from the Plaintiffs' case without notice to the Plaintiff or filing a formal Notice to Withdraw in accordance with the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure, can the Plaintiff later claim he received ineffective assistance of counsel?

II. If so, can the same Plaintiffs' Attorney without the consent of the Plaintiffs, and with the acquiescence of the District Court remain on the same case in violation of his fiduciary duties to the Plaintiffs, Disciplinary Rules of Professional Conduct, Judicial Precedent, and his oath of office?

III. What are the roles, responsibilities, and duties of United States District Court Judge in a complaint for declaratory, injunctive, and mandamus relief in which the Plaintiff requests for a jury trial?

LIST OF PARTIES IN COURT BELOW

1. Felicia Malveaux Ayanbadejo and John Ayanbadejo, Plaintiffs-Petitioners, *Pro se.*
2. Janet Napolitano, Secretary, Department of Homeland Security, Defendant-Appellees.
3. Sharon A. Hudson, District Director, United States Citizenship and Immigration Services, Defendant-Appellee.
4. United States Citizenship and Immigration Services, Defendant-Appellee.
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1. Moore's Federal Practice, § 56.11 (Mathew Bender, 3d ed)

2. Wright & Koch, Federal Practice & Procedure 4th ed.

3. Immigration Law and Family.

4. Immigration Law Sourcebook (14th ed) (2010-11)

5. O'Connor's Federal Rules, Civil Trials (2009)

CITATIONS OF OPINION AND ORDERS IN CASE

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is reprinted as Appendix A.

The Fifth Circuit's opinion affirms a judgment of the United States District Court for the Southern District of Texas, Houston Division and is reprinted as Appendix B.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 9, 2010 for the first Appeal. On or about July 13, 2010, Petitioner filed a Petition for Rehearing/Reconsideration/Consolidation on the Fifth Circuit's decision entered on June 9, 2010. The Court below on rehearing the consolidated Appeals entered an order (reprinted as Appendix B) denying the Petition for Rehearing on August 30, 2010.

This Petition is filed within 90 days of the said date, so that this Court has jurisdiction to review the judgment of the Fifth Circuit on petition for certiorari, which rests by virtue of Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

> arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes of Limitation: Remedies on Motion to Reopen

Filing deadlines govern a huge swath of civil claims, ranging from discrimination under Title VII of the Civil Rights Act of 1964 to habeas corpus under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See, e.g., Pace v. DiGuglielmo,* 544 U.S. 408, 410 (2005) (AEDPA); *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002) (Title VII). For these claims, plaintiffs must file within a prescribed time window, or risk forfeiting their claims forever. Exceptions have been made when deadlines would collide with the interests of justice. Courts created the doctrine of equitable tolling by recognizing that a plaintiff should be granted "additional time within which to sue (or meet some other deadline) if even diligent efforts on his part would not have enabled him to prepare and file his suit within the statutory period." *Lewis v. City of Chicago,* 528 F.3d 488, 493 (7th Cir. 2008). Statutes of limitations have been equitably tolled for a variety of reasons, including fraud, *See, e.g.,*

Iavorski v. INS, 232 F.3d 124, 234 (2d Cir. 2000) ineffective assistance of counsel, *See, e.g., Cekic v. INS*, 435 F.3d 267, 170 (2d Cir. 2006); *Mahmood v. Gonzales*, 427 F.3d 248, 251-52 & 252 n.8 (3d Cir. 2005) and mental incapacity. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 2242 (9th Cir. 1999).

STATEMENT OF THE CASE

Petitioners requests the Court to Review the Decisions of all the Courts below in this case including the decision denying the Petitioners' application to re-open the time for Appeal of the District Court's summary dismissal of the Petitioners' Complaint for declaratory, injunctive, and mandamus relief in which, Plaintiff-Petitioners, Mr. and Mrs. Ayanbadejo asserted that the respondents'-appellees' wrongful actions deprived Plaintiffs-Petitioners of their rights under judicial precedent, the Freedom of Information Act, the Immigration and Nationality Act, and under the United States Constitution at the administrative proceeding. (AR. 7-22, 107-130; entry number 1 and 24 of the district court's docket sheet). The outcome of this case will affect the duty lower Courts have to litigants before the Court and a Plaintiff counsel has to his clients when advising clients in immigration cases of his intention to withdraw and the rights of his clients to claim ineffective assistance of counsel when not advised or misadvised of procedural and/or substantive law concerning the case.

The decision below holds that due to the Decision in *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) for the premise that the time limitation for filing a notice of appeal is jurisdictional and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) for the premise that the lack of a timely notice mandates

dismissal of the Petitioners' Appeal, the Fifth Circuit has no jurisdiction to hear Petitioners application to Review the District Court's denial of Petitioners' motion to reopen the time for Appeal nor to transfer the Motion to the Court of Appeals for consideration. Respectfully, the Court failed and/or refused to consider Petitioners' argument that Petitioners' failure to file a timely notice of appeal was due to ineffective assistance of Petitioners' counsel.

Summary of Facts

On December 18, 1996, Mr. John Ayanbadejo (John, or Mr. Ayanbadejo, or Petitioner), a citizen of Nigeria, was lawfully admitted to the United States on a nonimmigrant visa, having come on the invitation of his younger sister to join in the celebration of the graduation of Ms. Ayanbadejo from Texas A&M University with a degree in Chemical Engineering and to visit with his other siblings. During the visit he met some of his sister's friends, one of whom was his current spouse, Ms. Felicia Malveaux (Felicia, or Mrs. Ayanbadejo, or Petitioner), a United States citizen.

On February 10, 1997, after a brief courtship, John and Felicia got married in Houston, Texas, and began living as husband and wife. (AR. 4, Dkt. No. 16.) On March 3, 1997, through the couple's attorney, Felicia filed with the United States Citizenship and Immigration Services (USCIS) an immediate relative visa petition and an application to change status, naming John as beneficiary. (AR. 4, Dkt. No. 16.) On March 17, 1997, a work authorization card was issued to John.

Administrative Proceedings

On December 16, 1999, more than two years after Mr. and Mrs. Ayanbadejo's marriage and after an interview to adjust John's status to that of lawful permanent status, the USCIS requested additional documentation from Felicia. Specifically, the USCIS requested proof of cohabitation, immunizations for John, and a letter of employment. All requested documents were provided. (AR. 4, Dkt. No. 16.)

On December 5, 2000, more than three years after Felicia's initial application, the USCIS issued a notice of intent to deny her visa petition on an allegation that she had not established eligibility for the benefit sought, relying on a purported investigation that revealed different addresses for John and Felicia during July 1997 and another time period, which the USCIS failed to specify. John and Felicia responded strongly to said notice with an affidavit dated January 24, 2001 in which the address discrepancies were fully explained and/or rebutted. (AR. 4, Dkt. No. 16.)

On or about April 17, 2001, due to lack of response on the first petition, John and Felicia filed another Form I-130 and were interviewed. (AR. 4, Dkt. No. 16.) On June 26, 2002, more than five years after the couple's marriage and initial application and more than a year after the second, the USCIS issued a second notice of intention to deny the petition, based on an allegation that John and Felicia were living separately and that the documentation submitted was insufficient to establish eligibility for the benefit sought.

Felicia responded by providing additional documentation and an affidavit dated July 17, 2002. In her affidavit she explained that career and

employment choices necessitated the couple's living apart temporarily. (AR. 4, Dkt. No. 16.)

On October 9, 2002, more than five years after John validly married Felicia under Texas law, the USCIS issued its notice of denial, based, again, on the allegation that they were temporarily living apart, notwithstanding the compelling evidence that had been submitted to establish the bona fides of the marriage.

On November 5, 2002, the couple timely filed an appeal of the USCIS's October 9, 2002 decision with the Board of Immigration Appeal (BIA), citing judicial precedent that was binding upon the BIA. (AR. 4, 203-16; Dkt. Nos. 16, 29.)

The USCIS neglected to forward the appeal to the BIA despite numerous requests to do so. (AR. 4, Dkt. No. 16.) On or about April 1, 2005, after a long and frustrating delay of more than two years, the couple sought congressional intervention on advice of counsel, and, on June 16, 2005, the BIA inexplicably rendered an opinion affirming the District Director's October 9, 2002 decision without opinion. That decision was timely appealed to the Fifth Circuit, but dismissed for lack of jurisdiction.

On April 10, 2006, John and Felicia brought a complaint in the District Court, seeking declaratory and mandatory relief. (Dkt. No. 1.) On July 18, 2006, the defendants filed a motion to dismiss for lack of subject-matter jurisdiction. (AR. 3, 40-54; Dkt. No. 11.) On August 21, 2006, Mr. and Mrs. Ayanbadejo filed their memorandum in opposition to defendants' motion to dismiss, attaching an appendix

containing portions of John's administrative records.[1] (AR. 4, Dkt. No. 16.) This Court granted the defendants' motion, and Mr. and Mrs. Ayanbadejo timely appealed that dismissal on October 26, 2006. (AR. 5, 229-30; Dkt. No. 30.)

The Fifth Circuit reversed the Court's dismissal for lack of jurisdiction and remanded the case for further proceedings. *Ayanbadejo v. Chertoff*, 517 F.3d 273, 278 (5th Cir. 2008). The defendants moved for summary judgment.

The District Court Decision on Remand

On or about April 11, 2008, Plaintiff Mr. Ayanbadejo[2] hired Mr. Salvador Colon, after reading

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[1]The same day, the couple also filed an application for leave to file amended pleadings and amended pleadings. (AR. 4, 99-129; Dkt. Nos. 23, 24.) On August 29, 2006, defendants filed a response to the Ayanbadejos' opposition to defendants' motion to dismiss. (AR. 5, 130-35; Dkt. No. 17.) On September 5, 2006, Mr. and Mrs. Ayanbadejo filed a supplemental memorandum in opposition to defendants-appellees' motion to dismiss. (AR. 5, 147-59; Dkt. No. 19.)

On September 8, 2006, as a result of a FOIA action, the defendants finally produced the complete immigration records. On receipt of the records, plaintiffs' counsel noticed that the defendants had failed to transmit the couple's brief to the BIA. (AR. 5, 178-225; Dkt. No. 27.) On September 25, 2006, John obtained an exact copy of the letter that had accompanied the brief and the certificate of return receipt, providing irrefutable evidence of timely receipt of the brief by the defendants. (AR. 5, 178-225; Dkt. No. 27.) On September 28, 2006, the couple filed a motion for new trial based on the failure and/or refusal of defendants to transmit the brief to the BIA. (AR. 5, 178-225; Dkt. No. 27.) On October 3, 2006 the district court denied Mr. and Mrs. Ayanbadejo's motion for new trial. (AR. 5, 226-28; Dkt. No. 29.).

[2] To the best of his knowledge, Mr. Ayanbadejo though still married to Mrs. Felicia Malveaux Ayanbadejo no longer resides with her, however Mr. Ayanbadejo provides her with financial

a synopsis of him on the internet, as additional counsel to represent him and his United States Citizen spouse for further proceedings before the Court of Appeals and on remand to the lower Court. Diligently, Mr. Ayanbadejo had hired multiple attorneys to represent Plaintiffs-Petitioners including the Law Firm of O.J. Lawal, original attorneys for Plaintiffs, and Mr. Ambrose O'Neal.

On or about 09/15/2009, unknown to Plaintiff-Petitioner, Mr. Ayanbadejo, the Court respectfully, imposing her own views about a "real marriage", establishing conditions and requirements beyond INS regulations and judicial precedent, and noting and/or insisting that only petitioner's spouse testimony in adjustment hearing is relevant issued its Memorandum and Order granting the Government's Motion for Summary Judgment, dismissing the case with prejudice. *See* Appendix B.

Plaintiffs-Petitioners, who were entitled to receive notice of the entry of judgment, did not receive notice until Monday, March 29, 2010, more than 21 days after the entry of judgment primarily and proximately due to Mr. Colon's actions, lead counsel for petitioners.

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and moral support to the best of his abilities whenever she requests it. To the best of his knowledge, petitioners have no criminal record and are both Catholics. *See Matter of McKee*, 17 I&N Dec. 332 (BIA 1980) [visa petition could not be denied solely because the parties were no longer living together]; *Hernandez v. Ashcroft*, 345 F.3d 824, 845-49 (9th Cir. 2003) [the nonviability of a marriage cannot alone be the basis to deny adjustment even if immigration characterizes its decision to deny as discretionary]; *Dabaghian v. Civiletti*, 607 F.2d 868 (9th Cir. (1979) [visa petition could not be denied solely because people not living together].

Mr. Colon expressly admits to Mr. Ayanbadejo that he received the Court's 9/15/2009, but did not notify Mr. Ayanbadejo, nor take or pursue an appeal because allegedly he was no longer representing Plaintiffs-Petitioners. Mr. Colon stated Mr. Ayanbadejo fired him and Mr. Ayanbadejo denied firing Mr. Colon.

Mr. Colon could not produce any document expressly stating that Mr. Ayanbadejo had fired him nor did Mr. Colon file a Motion to Withdraw before the Lower Court as attorney-in-charge of Plaintiffs-Petitioners in accordance with the Federal Rules of Civil Procedure, Texas Disciplinary Rules of Professional Conduct or Judicial Precedent. Mr. Ayanbadejo in compliance with the procedural requirements established in *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), reported the matter to the Texas Board of Disciplinary Appeals. None of the other attorneys hired by Mr. Ayanbadejo to represent Plaintiffs-Petitioners received Notice of the Court's 9/15/2009 Decision or if they did, they failed to inform Mr. Ayanbadejo of receipt of the Court's Notice. *See* Appendix H. Respectfully, contrary to the finding of the Court Mr. Ayanbadejo was diligent in frequently inquiring from Mr. Ambrose O'Neal regarding the status of Petitioners' case. *See* Appendix I. *See Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155-57 (3d Cir. 2007) [respondent not required to file a bar charge where lawyer confessed error and submitted a detailed affidavit regarding his ineffective assistance].

Petitioners after notice timely sought reopening of the time to Appeal the District Court's decision, motion to recuse, and motion to disqualify. All applications were dismissed by the District Court.

In the course of the proceedings the District Court Judge acquiesced to Mr. Colon remaining on the case ostensibly for the Defendants in violation of his fiduciary duties to Plaintiffs-Petitioners, the Texas Disciplinary Rules of Professional Conduct, and Judicial Precedent. Plaintiffs-Petitioners have a right to representation by competent counsel. INA §§240(b)(4), 292, 8 C.F.R. §§292, 1240.3, 1292. *Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974).

The Court of Appeals Decision

Citing *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) for the premise that the time limitation for filing a notice of appeal is jurisdictional and *Robbins v. Maggio*, 750 F.2d 405, 408 (5th Cir. 1985) for the premise that the lack of a timely notice mandates dismissal of the Petitioners' Appeal, the Fifth Circuit affirmed the District Court's denial of Petitioners' application to reopen the time for Appeal. Respectfully, the Court failed and/or refused to consider Petitioners' argument that Petitioners' failure to file a timely notice of appeal was due to ineffective assistance of Petitioners' counsel. *See* Appendix A – M.

Existence of Jurisdiction in Courts Below

This action was commenced by Petitioner, John Ayanbadejo and his spouse in the United States District Court for the Southern District of Texas. The District Court has jurisdiction over the matter pursuant to INA §§ 201(b), 204(b), 291; 8 U.S.C.A. §§ 1151(b), 1154(b); 8 U.S.C.A. § 1329; 28 U.S.C. §§ 1331, 1346(a)(2), 1361, 2201- 2202; 5 U.S.C. 701, et seq., 706(1), 555(b), 557; and Rule 57 of the Federal Rule of Civil Procedure. *See Chan v. Bell*, 464 F. Supp. 125 (D.D.C. 1978).

The final judgment of the District Court was entered on September 15, 2009. Plaintiffs-Petitioners, who were entitled to receive notice of the entry of judgment, did not receive notice until Monday March 29, 2010, more than 21 days after the entry of judgment primarily and proximately due to the ineffectiveness of petitioners' counsel. Petitioners timely sought, after notice, to reopen the time for appeal. Petitioners rely on the dissenting opinion of this Court in *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and other favorable decisions of this Court and lower courts as cited in their Petition for Writ to establish jurisdiction in the United States Court of Appeals for the Fifth Circuit.

ARGUMENT FOR ALLOWANCE OF WRIT

The Petitioners herein refers to and adopt all their previous arguments made in the Courts below and in petitioners'-appellants' brief, which was never transmitted to the Board of Immigration Appeals by Respondents and incorporates them here as if set forth in full. Failure to argue any particular issue argued in Mr. and Mrs. Ayanbadejo's said briefs is not to be construed as a waiver or abandonment of that issue.

1. Whether the District Court and/or the Court of Appeals has jurisdiction to reopen the time for appeal to afford relief from Petitioners' Counsel's failure to file a timely petition for review with the Court of Appeals of the District Court's summary order denying Petitioners' Complaint for Declaratory Action.

With all due respect to this Court and the Courts below, petitioners adopts the argument of dissenting opinion of this Court in *Bowles v. Russell*, 551 U.S. 205, 212-13 (2007) and incorporates them here as if

set forth in full. Petitioner strongly urges this Court to apply the law as stated in dissent to this case.

As this Court in respectfully dissent stated,

> [**2368] The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and [***107] *sua sponte* consideration in the [*217] courts of appeals mandatory, see *Arbaugh*, *supra*, at 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097.2 As the Court recognizes, *ante*, at 210-211, 168 L. Ed. 2d, at 103-104, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick*, *supra*, at 452, 124 S. Ct. 906, 157 L. Ed. 2d 867 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh*, 546 U.S., at 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed

"jurisdictional,"'" *id.*, at 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (quoting *Scarborough* v. *Principi*, 541 U.S. 401, 414, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.3

2 The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may . . . extend the time for appeal upon a showing of excusable neglect or good cause." ..... What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit.

Most circuit courts that have addressed the issue have found that the 30-day deadline is not jurisdictional. *See Huerta v. Gonzales,* 443 F.3d 753 (10th Cir. 2006) [holding that 30-day filing period is not jurisdictional but a mandatory, claims-processing rule, citing to *Eberhart,* and therefore where BIA accepted an appeal one day late it did not lose jurisdiction over the case]; *Khan v. DOJ,* 494 F.3d 255, 257-59 (2d Cir. 2007) [where DHL delivered the notice of appeal one day late to the BIA, Bowles did not bar petitioner from providing extraordinary or unique circumstances for the failure to timely appeal].

There is no fixed time limit for making a motion to reopen based on lack of notice. *See Holmberg v. Ambrecht,* 327 U.S. 392, 397 (1946) (*quoting Bailey v. Glover,* 88 U.S. (21 Wall.) 342, 348 (1874). "[W]here a plaintiff has been injured by fraud and 'remains in

ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *See also, Iavorski v. INS*, 232 F.3d 124, 234 (2d Cir. 2000) ineffective assistance of counsel, *See, e.g., Cekic v. INS*, 435 F.3d 267, 170 (2d Cir. 2006). In *Wong v. Bowen*, C.A. 2d, 1988, 854 F.2d 630, 631 (Equitable tolling will be allowed in those cases where the agency acts in a "misleading or clandestine way.").

The Fifth Circuit held that a state county district clerk's office's apparent practice of mishandling prisoner petitions for state post-conviction relief, constituted a state impediment under 28 U.S.C. § 2244(d)(B) which tolled the AEDPA limitations period applicable to the prisoner in this case. *Critchley v. Thaler*, 586 F.3d 318 (5th Cir. 2009).

In *Riley v. INS*, 310 F.3d 1253 (10th Cir. 2002), the petitioner filed a habeas corpus petition two years after his deportation order became final. Petitioner alleged, in part, that prior counsel's ineffective assistance of counsel rendered his deportation order unlawful. The district court exercised habeas jurisdiction and the Tenth Circuit, adopting the rationale of the *Chamkov* and *Luya Liu* courts, affirmed the availability of habeas jurisdiction to non-criminal deportees.

In *Luya Liu v. INS*, 293 F.3d 36 (2d Cir. 2002), the petitioner filed a *pro se* habeas petition after the Second Circuit dismissed her petition for review as untimely. Concluding that petitioner's "sole means to obtain review of the BIA's decision consisted of a direct appeal," the district court dismissed the petition for lack of jurisdiction. *Luya Liu*, 293 F.3d at 38. The Second Circuit reversed, stating that "[n]othing in *St. Cyr* suggests that its holding – in

substance, an extended exercise in statutory construction -- applies only to criminal aliens." *Luya Liu*, 293 F.3d at 40. Thus, the court concluded that habeas corpus jurisdiction remained regardless of the petitioner's status or grounds of removability. *Luya Liu*, 293 F.3d at 41.

In addition, in an unpublished decision, the Ninth Circuit noted that ineffective assistance of counsel for failure to file an appeal brief to the BIA and a petition for review might permit habeas review. *Harmeet Singh v. BIA*, 2003 U.S. App. LEXIS 20794 (9th Cir. 2003) (unpublished). Citing *Chamkov* and *Luya Liu*, the court noted that "[i]t remains open to Petitioner to raise this Fifth Amendment claim in a petition for a writ of habeas corpus pursuant to 28 U.S C. § 2241."

Some district courts have been receptive to exercising habeas jurisdiction despite the availability of direct review in the court of appeals. *See, for example, Kaweesa v. Ashcroft*, 345 F. Supp. 2d 79, 2004 U.S. Dist. LEXIS 24503, *41 (D.Mass. 2004) ("the provisions in 8 U.S.C. § 1252 limiting 'judicial review' to direct review in the courts of appeals do not foreclose habeas jurisdiction in the district courts."); *Saba v. INS*, 52 F. Supp. 2d 1117, 1123 (N.D.Cal. 1999) (habeas jurisdiction exists where "no other avenue of judicial review" available to petitioners due to the ineffective assistance rendered by counsel). *See* ABA Model Rules of Prof. Conduct, Rule 1.16 (2004); *See, e.g., Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676, 679 (3d Cir. 1986) (local rules allowed judge to deny withdrawal even though client dismissed counsel. In most districts a lawyer cannot withdraw without securing leave of court. E.g, Local

Rules Ill. (N.D.); Rule 83.177 (2004); Local Rules N.Y. (E.D. & S.D.), Rule 1.4 (2004).

Mr. Colon's actions in failing to notify Petitioner John Ayanbadejo of his withdrawal from the case and failing to file his motion to withdraw in accordance with the Federal Rules of Civil Procedure while still being listed as "attorney-in-charge" of the Petitioners with the acquiescence of the court in the matter can be likened to the cases cited *supra* because as attorney-in-charge of Petitioners, Mr. Colon is subscribed to the same oath of office as government employees and therefore has the same duties and responsibilities.

From the foregoing because the Fifth Circuit Court of Appeals decision conflicts with other circuit courts' decision; the position of the respondents' in *Afanwi v. Mukasey*, 130 S. Ct. 350, 175 L. Ed. 2d 4 (2009); and the decision of this court to remand in *Afanwi*; respectfully the Fifth Circuit's reliance on *Bowles* and *Robbins* as applied to the peculiar facts of this case as distinguished from *Bowles* and *Robbins* is in error and this writ ought to be accepted and considered.

1. If a Plaintiffs' Attorney in the Court below affirmatively misadvises the plaintiff and then allegedly withdraws from the Plaintiffs' case without notice to the Plaintiff or filing a formal Notice to Withdraw in accordance with the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure, can the Plaintiff later claim he received ineffective assistance of counsel?

The majority of circuits have suggested or held that the Due Process Clause creates a Right to Assistance of Counsel that is sufficiently effective in immigration proceedings to prevent immigration proceedings from being fundamentally unfair. *See Zeru* v. *Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Aris* v. *Mukasey*, 517 F.3d 595, 600-601; (2d Cir. 2008); *Fadiga* v. *Attorney Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Denko* v. *INS*, 351 F.3d 717, 723-724 (6th Cir. 2003); *Nehad* v. *Mukasey*, 535 F.3d 962, 967; (9th Cir. 2008); *Tang* v. *Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *Dakane* v. *United States Att'y Gen.*, 399 F.3d 1269, 1273-1274 (11th Cir. 2005). The Fifth Circuit in *Olvera v. INS*, 504 F.2d 1372 (5th Cir. 1974), has held that, Plaintiffs-Petitioners have a right to representation by competent counsel. The Ninth Circuit has said that aliens have "a constitutional right to the assistance of counsel in immigration proceedings." *Alcala v. Holder*, 563 F.3d 1009, 1015 n. 11.

The neglect of legal matters by the lawyers to whom they have been entrusted is one of the most widely condemned failures of our profession. *See* Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?* 1974 U.ILL. L. FORUM 193, 210-13 (1974) (citing reports and statistics from various jurisdictions that show neglect as the most common complaint against attorneys). Numerous cases decided under both current and prior laws have concluded that prejudicial delay such as failure to commence an action, file a motion for new trial or take an appeal – could subject a lawyer to discipline. *See Joyner v. Commission for Lawyer Discipline*, 102 S.W.3d 344, 346-347, 347-48 (Tex.App.-Dallas 2003, no pet.) (lawyer failed to file

suit within limitations period); *Attorney Grievance Comm'n v. Nisbett*, 316 Md. 464, 560 A.2d 18, 19 (1989).

Tex. Rule 1.15(d) imposes certain duties on lawyers with respect to matters in which representation has been terminated. The first of these duties is "giving reasonable notice to the client" of the lawyer's intention to withdraw. *See Eureste v. Comm'n for Lawyer Discipline*, 76 S.W.3d 184, 201 (Tex.App.-Houston [14th Dist.] 2002, no pet.) [Court found the notice provided by the lawyer was unreasonable]. This notice allows the client an opportunity to secure new counsel and to take any other necessary measures to protect its interests. *See, e.g., Moss v. Malone*, 880 S.W.2d 45, 50-51 (Tex.App.-Tyler 1994, writ denied) (trial court erred in granting lawyer's deceptive motion to withdraw and in denying client adequate opportunity to secure new counsel); *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986) (noting that the court must give a party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial); *Robinson v. Risinger*, 548 S.W.2d 762, 766 (Tex.Civ.App. – Tyler 1977, writ ref'd n.r.e) (even when an attorney justifiably withdraws, he should protect the welfare of his client by suggesting employment of other counsel).

The reasonableness of the notice will be a question of fact in each case. Under prior law, notice was held insufficient when it failed to clearly apprise the client that the lawyer intended to withdraw, it failed to apprise the client of pending proceedings affecting the case, it was not furnished to the client, or did not allow sufficient time under the circumstances for the client to protect his interests.

See, e.g., Matter of Feuerstein, 115 N.J. 278, 558 A.2d 828, 832 (1989) (oral notice of withdrawal insufficient); *In re Crane,* 400 Mich. 484, 255 N.W.2d 624, 628 (1977) (printed form letter does not constitute notice); *Cardot v. Luff,* 164 W.Va. 307, 262 S.E. 2d 889, 893 (1980) (notice insufficient where clients in civil case did not receive notice of hearing on formal withdrawal motion); *Louisiana State Bar Ass'n v. Carpenter,* 553 So.2d 855, 857 (La. 1989) (lawyer abandoned client without notice by failing to appear in Court); *Womack v. Warden,* 95 Nev. 806, 603 P.2d 267 (1979) (notice of withdrawing counsel for indigent appellant insufficient when only respondent warden received formal notice). *Cf. Eureste v. Comm'n for Lawyer Discipline,* 76 S.W.3d 184, 201 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (lawyer violated Rule 1.15(d) by not notifying client of impending closure of office and lawyer's resultant withdrawal, when the client was first contacted by an employee of the lawyer just before that closure occurred); *People v. Bruinsma,* 34 Mich.App. 167, 191 N.W.2d 108, 113 (1971). Because cases decided under prior law concluded that inadequate notice may result in continuation of the relationship as a matter of law, it is extremely important to give notice of withdrawal. *See Atilus v. United States,* 406 F.2d 694, 696 (5th Cir. 1969); *Ward v. State,* 740 S.W.2d 794, 789-99 (Tex. Crim.App. 1987). Mr. Colon in Petitioners' case failed and/or refused to notify Petitioners of his intention to withdraw or file his Motion to Withdraw in accordance with the Federal Rule of Civil Procedure.

Finally, even though a lawyer has advised his client of the lawyer's intention or desire to withdraw from the representation, the lawyer continues to owe

basic duties of diligence and loyalty to the client until withdrawal is actually accomplished in accordance with these Rules and any applicable rules of practice or procedure. *See Hines v. Comm'n for Lawyer Discipline,* 28 S.W.3d 697 (Tex.App.-Corpus Christi 2000, no pet.) (lawyer who withdrew from representation without taking appropriate steps to protect former client's remaining trial and appellate rights is subject to discipline); *Vander Voort v. State Bar of Texas,* 802 S.W.2d 332 (Tex.App.- Houston [1st Dist.] 1990, writ denied) (lawyer who withdrew without complying with applicable court rules disciplined). Thus lawyers remain subject to discipline for actively working against their client's interests after seeking to withdraw, or for abandoning a matter before properly withdrawing. *See, e.g., In re McCausland,* 605 N.E.2d 185 (Ind.1993) (lawyer discipline for vindictive refusal to return client's files even when requested to do so by client's new lawyer); *In re Slaughter,* 261 Ga. 433, 405 S.E.2d 481 (1991) (lawyer disciplined for failing to return client's document and refund unearned fees upon being discharged); *Sterling v. Jones,* 255 La. 842, 233 So.2d 537, 539 (1970) (attorney owes a duty to the client after withdrawing not to do any act which would be contrary to the interests of that former client). *Also see, In re McCool,* 165 Wis.2d 500, 477 N.W. 2d 631 (1991) (lawyer disciplined for abandoning convicted client just before sentencing, when he merely told client he was moving but left no way for client to contact him); *In re Roberts,* 524 N.E.2d 1272, 1273 (Ind.1988); *Louisiana State Bar Ass'n v. Carpenter,* 553 So.2d 855, 857 (La. 1989); *Florida Bar v. Timson,* 257 So.2d 44, 45 (Fla.1971); *In re Price,* 244 Ga. 532, 261 S.E.2d 349, 349 (1979). *Cf. Penson v. Ohio,* 488 U.S. 75, 109 S.Ct. 346, 102

L.Ed.2d 300 (1988) (procedural rules governing withdrawal of counsel for protection of client, and if lawyer seeks to withdraw without complying with them, motion should denied, even where no prejudice is shown).

Although an IJ has wide discretion to allow a counsel to withdraw, she must take into consideration the need to protect the client. *Immigration Judge's Benchbook* I:8:I.D.5. A lawyer's professional responsibility upon withdrawal includes the duty to take reasonable steps to avoid foreseeable prejudice to the rights of the client, including giving notice to the client, allowing time for the employment of other counsel, and delivering to the client all papers and property to which the client is entitled. Model Rules of Prof. Conduct R. 1.16(d)." *Gjeci v. Gonzales*, 451 F.3d 416, 421-23 (7th Cir. 2006) [where IJ failed to take steps to protect respondent's interests before permitting withdrawal of counsel and then denied respondent a continuance, due process was violated].

There is a denial of right where there is ineffective assistance of Counsel. *See e.g., Fadiga v. Attorney General USA*, 488 F.3d 142, 155-63 (3d Cir.2007) [a claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment as a violation of due process and court reversed denial of motion to reopen for ineffective assistance holding that it violated due process]. *Also see Mai v. Gonzales*, 473 F.3d 162, 165-67 (5th Cir. 2007) [reversed BIA denial of motion to reopen for ineffective assistance despite BIA's claim that the lawyer made a strategic decision when he admitted two grounds of removal where one required a §212(c) waiver and the second a waiver under §240A because

once §212(c) granted for the first ground §240A was unavailable for the second].

Mr. Ayanbadejo has not at any time granted Mr. Colon any consent to testify adversely to petitioners' interest nor does Mr. Ayanbadejo wish to do so either now, in the future or ever.

From the foregoing it can be deduced that the Petitioners can claim they received ineffective assistance of counsel and because the Fifth Circuit Court of Appeals decision conflicts with the settled position of this Court in *Penson v. Ohio,* 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) and other Fifth Circuit court's decision; the position of the respondents' in *Afanwi v. Mukasey,* 130 S. Ct. 350, 175 L. Ed. 2d 4 (2009); and the decision of this court to remand in *Afanwi*; respectfully the Fifth Circuit's reliance on *Bowles* and *Robbins* as applied to the peculiar facts of this case as distinguished from *Bowles* and *Robbins* is in error and this writ ought to be accepted and considered.

II. If so, can the same Plaintiffs' Attorney without the consent of the Plaintiffs, and with the acquiescence of the District Court remain on the same case in violation of his fiduciary duties to the Plaintiffs, Disciplinary Rules of Professional Conduct, Judicial Precedent, and his oath of office?

Rule 1.01 paragraph (b) addresses the situation where a lawyer's testimony, if offered, would be unfavorable to the client. Its structure precludes its possible use as a tactical litigation device. Since a lawyer would not have to volunteer such adverse testimony, the Rule does not require any action on the lawyer's part until it appears that the lawyer will

be compelled to furnish it. Even then the lawyer need not do anything unless that testimony would be "substantially adverse to the lawyer's client." If the lawyer believes that he will be compelled to furnish substantially adverse testimony, paragraph (b) requires the lawyer to treat the situation in accordance with the general conflict of interest principles set out in Rule 1.06, which provide that a client may consent to the representation after disclosure of potential adverse effects.

The Fifth Circuit has taken the position that under ABA Model Rule 3.7, the counterpart to this Rule, "[i]f a lawyer must testify adversely to a client's interest, the client cannot waive the conflict." *Horaist v. Doctor's Hospital of Opelousas,* 255 F.3d 261, 266 (5th Cir. 2001) (citing *Federal Deposit Insurance Corp. v. United States Fire Ins. Co.,* 50 F.3d 1304, 1314 (5th Cir. 1995)).

As stated above Mr. Ayanbadejo has not at any time granted Mr. Colon any consent to testify adversely to the Plaintiffs' interest nor does Mr. Ayanbadejo wish to do so either now, in the future or ever. Therefore from the foregoing the same Plaintiffs' Attorney without the consent of the Plaintiffs, and even with the acquiescence of the District Court cannot remain on the same case without violating his duties.[3]

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[3] The Texas Supreme Court has revised some of the proposed changes to the Texas Disciplinary Rules of Professional Conduct. Revised Rule 1.00(k) defines "informed consent" as a person's agreement to "proposed conduct" after a lawyer has explained in a manner "a reasonable lawyer would believe sufficient" for the person to understand the material risks of and available alternatives to the conduct. Revised Rule 1.00(o) defines "personally prohibited" to mean a lawyer is prohibited

2. Whether the District Court erred by imposing her own views about a "real marriage", establishing conditions and requirements beyond INS regulations and judicial precedent, and insisting that only petitioner's spouse's testimony in an adjustment hearing is relevant.

III. What are the roles and duties of United States District Court Judge in a complaint for

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from representation based on the lawyer's "direct knowledge or involvement" in a matter or transaction. The prohibition extends to lawyers who did not personally represent a client but nonetheless obtained confidential information about that client. Revised Rule 1.06(b) states: "A lawyer shall, not even with informed consent represent opposing parties in the same matter before a tribunal." Under revised Rule 1.09 the Texas Supreme Court removed the definition of "substantially related" and under revised Rule 1.09(c)(1) the Texas Supreme Court eliminated the word "knowingly". The said revised Rule 1.09(c)(1) provides that unless a former client gives informed consent, a lawyer who personally represented the client in a matter shall not thereafter represent another person in a matter adverse to the former client, "in which such other person questions the validity of the lawyer's services or work product for the former client." The Rule as revised makes it "a strict liability" to enter into a representation that is inconsistent with the interest of a former client without obtaining a waiver from the former client. The revisions are similar to the language in the American Bar Association's Model Rules of Professional Conduct. *See* Texas Lawyer Vol. 26 at 1 and 15. *Also See In re Dresser Indus.*, 972 F.2d 540, 543 (5th Cir.1992) (local rules are not sole authority governing motions to disqualify because local rules alone cannot regulate party's right to counsel of its choice). Thus, the trend favors imposition of more rigorous standards for violations of some Rules of Professional Conduct, especially those that may affect the due process rights of individuals under a "strict liability" principle warranting immediate sanctions under the American Bar Association's Model Rules of Professional Conduct.

declaratory, injunctive, and mandamus relief in which the Plaintiff requests for a jury a trial?

The Due Process Clause of the U.S. Constitution entitles a person to an impartial and disinterested tribunal in all cases. *See Caperton v. A.T. Massey Coal Co.*, __U.S.__, 129 S.Ct. 2252, 2267 (2009); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The Due Process Clause, however, provides only the outer boundaries of judicial disqualification, and congress and the States can impose more rigorous standards. *Caperton*, __ U.S. at __, 129 S.Ct. at 2267; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

See Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 1038 (2000) [Sixth Amend. Right to counsel violated where defendant can show reasonable probability that he would have appealed case]

See Agyeman v. INS, 296 F.3d 871, 884-85 (9th Cir. 2002) [reversed BIA because of "potential" prejudice where IJ insisted that only respondent's wife testimony in an adjustment hearing is relevant]. *Podio v. INS*, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); *Perez-Lastor v. INS*, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); *Colemenar v. INS*, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing").

Moreover, several errors -- each of which alone might be harmless – can have a combined effect that is prejudicial. *See, e.g., Vargas-Garcia v. INS*, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

See also Miller v. Albright, 118 S.Ct. 1428 (1998) [Standing found in some opinions of the Justices even where transmitting parent did not petition]; *Breyer v. Meisner*, 214 F.3d 416, 423-26 (3d Cir. 2000) [beneficiary of derivative citizenship claim had standing to assert mother's claim of discriminatory transmission of citizenship solely by fathers]; *U.S. v. Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999) *judgment vacated on other grounds* 533 U.S. 913 (2001) [third party standing by beneficiary son where father deceased]. Persons subject to denaturalization having standing to make facial challenge to AG's authority without awaiting procedures.

Beneficiaries of immigrant visa petitions also have standing. *See Abboud v. INS*, 140 F.3d 843, 847 (9th Cir. 1998); *Ghaly v. INS*, 58 F.3d 1425, 1434 n.6 (9th Cir. 1995) [beneficiary had standing to contest revocation of visa petition]; *Lockhart v. Chertoff*, Case No. 1:07CV823 (N.D. Ohio Jan. 7, 2008), 2008 WL 80225 [spouse of deceased husband seeking validity of I-130 although not married for two years had standing]; *Oddo v. Reno*, 17 F.Supp.2d 529, 531 (E.D. Va. 1998) [Same]; *Sanchez-Trujillo v. INS*, 620 F. Supp. 1361 (W.D.N.C. 1985) [beneficiary of 2d preference petition had standing to sue for approval of deceased father's petition]; *Taneja v. Smith*, 795 F.2d 355 (4th Cir. 1986) [beneficiary of 6th preference petition had standing]. Standing exists where there is a threatened injury. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 987-88 (5th Cir. 2000) [policy of seizing green cards and providing temporary documents results in sufficient injury because "green cards play a significant role in the day-to day lives of LPRs"].

Under Federal Rule of Evidence (FRE) 603 Mrs. Malveaux Ayanbadejo's affidavits filed before this Court as part of the Court's record qualify as testimony in the support of Mr. Ayanbadejo's petition and such testimony is self authenticating under FRE 902, which states in pertinent part, as follows:

"Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments."

Also see U.S. v. Paulino, 13 F.3d 20, 23 (1st Cir. 1994). "Under the [FREs], authentication can be accomplished without the direct testimony of either a custodian or a percipient witness."

Therefore from the foregoing the Judge's remarks and actions is compelling evidence of this Court's personal prejudice towards the Plaintiffs. *See U.S. v. Holland,* 655 F.2d 44 (5th Cir. 1981) [Judge's remarks at the trial showed a personal prejudice against defendant for successfully appealing his conviction on the basis of the judge's actions during a prior trial of the case].

Petitioner strongly urges this court not to make a distinction between private attorneys and government attorneys or civil and criminal cases because in light of the dissenting opinion in *Bowles supra* all attorneys regardless of whether they are private or government attorneys subscribe to same Oath of Office and stakes are equally as high in civil as in criminal cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully Submitted,
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